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No. 95-258

In the

Supreme Court of the United States

October Term, 1995

JAMES E. JONES, JR., et al.,

Petitioners,

v.

SHANNON RICHEY FAULKNER,

Respondent,

and the

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

VALORIE K. VOJDIK
Counsel of Record
New York University
School of Law
137 MacDougal Street
New York, New York
10012
(212) 998-6550

ROBERT R. BLACK
23 Broad Street
P.O. Box 643
Charleston, South Carolina
29402
(803) 577-5806

HENRY WEISBURG
THOMAS F. SWIFT
MARY K. WARREN
VANESSA BEEVER
Shearman & Sterling
153 East 53rd Street
New York, New York
10022
(212) 848-4000

SUZANNE E. COE
Arnold & Coe
408 North Church Street,
Suite C
Greenville, South Carolina
29601
(803) 235-4505

QUESTIONS PRESENTED

Whether the Court of Appeals properly exercised its discretion in concurring in factual findings by the district court, which were not appealed, concerning a state's proferred justification for a gender classification.

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Shannon Richey Faulkner, respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Fourth Circuit's Opinion in this case.

STATEMENT OF THE CASE

A. *Nature of the Case*

Shannon Richey Faulkner commenced this action under 42 U.S.C. § 1983 on March 2, 1993 in the United States District Court for the District of South Carolina, on behalf of herself and all others similarly situated, asserting that The

Citadel's males-only admission policy violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. She sought a permanent injunction compelling her admission to The Citadel's Corps of Cadets. In June 1993, the District Court granted the motion of the United States of America to intervene as a party-plaintiff.

On September 11, 1995, Nancy Mellette filed a motion with this Court to be added as a party or, in the alternative to intervene as a party in this petition and the petition for certiorari filed by Ms. Faulkner on July 11, 1995. Nancy Mellette is a South Carolina resident who is currently in her senior year of high school at Oak Ridge Military Academy, a military boarding school in Oak Ridge, North Carolina. Ms. Mellette is a Second Lieutenant in her cadet cadre, ranks fourth in her class and holds eleven letters in various sports. Her father attended The Citadel and is a member of the school's alumni association. Her brother is currently a senior at The Citadel. Ms. Mellette has long wished to join The Citadel's Corps of Cadets after her graduation from high school, and she is qualified in all respects for admission to the Corps, other than her gender. Upon widespread media reports of Ms. Faulkner's withdrawal from the Corps of Cadets, Ms. Mellette immediately stepped forward as a potential plaintiff in order to represent her own interests and those of similarly situated women in the continuing legal challenge to The Citadel's discriminatory admission policy. Ms. Mellette is also seeking to intervene as a plaintiff and to be designated as a class representative in *Faulkner v. Jones, Civ. Action No. 2:93-488-2*, pending in the United States District Court for the District of South Carolina.

B. *The District Court's Decision in Faulkner I*

The District Court issued an opinion on July 22, 1994, following a two-week evidentiary hearing on Shannon Faulkner's motion for summary judgment, holding that The Citadel's males-only admission policy violates the rights of Shannon Faulkner and other women to equal protection under the law as guaranteed by the Fourteenth Amendment.

Faulkner v. Jones, 858 F. Supp. 552 (D.S.C. 1994) ("Faulkner I"). The District Court found that the only remedy available to redress the violation of Shannon Faulkner's rights was to order her immediate admission into the Corps of Cadets.

In view of the decision of the United States Court of Appeals for the Fourth Circuit in *United States v. Commonwealth of Virginia*, 976 F.2d 890 (4th Cir. 1992), cert. denied, 113 S. Ct. 2431 (1993) ("*VMI I*"), the District Court limited the issues at trial on the summary judgment motion to (1) whether defendants could articulate any fact or argument that distinguished this case from the decision in *VMI I*; and (2) if liability were found, the appropriate remedy for the violation of the rights of Shannon Faulkner and other similarly situated women. Shannon Faulkner and the District Court accepted the findings and conclusions of *VMI I* as binding *solely* for the purposes of determining unresolved factual issues raised by Shannon Faulkner's motion for summary judgment. The District Court specifically reserved Shannon Faulkner's right to challenge at a future trial the alleged value of single-sex education, the asserted pedagogical value of The Citadel, or any other issue that distinguishes The Citadel from VMI. *Faulkner I*, 858 F. Supp. at 555 n.5[1] (Appendix to Faulkner Petition for a Writ of Certiorari ("Faulkner Appendix" at 36a).

The District Court found that The Citadel offered a military-style education that is not available at any other institution in South Carolina. *Faulkner I*, 858 F. Supp. at 556 (Faulkner Appendix at 38a). It further found that The Citadel is the only single-sex public college in South Carolina. The District Court expressly rejected defendants' argument

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[1] The Court of Appeals conceded that the District Court did not try either of these issues, but rather preserved the right of Shannon Faulkner and the United States to offer evidence disputing the alleged pedagogical benefits of The Citadel's single-sex program or any other issue that distinguished The Citadel from VMI. *Faulkner v. Jones*, 51 F.3d 440, 444 (4th Cir. 1995) ("*Faulkner II*") (Faulkner Appendix at 6a).

that the exclusion of women from The Citadel was justified by a state policy favoring single-sex education, where sufficient demand existed, as part of a diverse educational system. *Id.* at 564 (Faulkner Appendix at 53a-54a). The District Court made no finding that South Carolina had a policy of providing single-sex education; instead, it found that each of the formerly single-sex colleges in the state has become coeducational, except for The Citadel. *Id.* at 560 (Faulkner Appendix at 46a-47a).

Even if demand were somehow relevant, the District Court found that petitioners had not offered any evidence that single-sex educational opportunities are not available to women in South Carolina because there is insufficient demand for them. *Id.* at 564 (Faulkner Appendix at 54a). While petitioners argued that Winthrop College, a former public college for women, decided to admit men due to a lack of demand for single-sex education, the District Court found that the evidence did not support that assertion. *Faulkner I*, 858 F. Supp. at 566 (Faulkner Appendix at 58a-59a); *Faulkner II*, 51 F.3d at 445-446 (Faulkner Appendix 7a-9a). The District Court found that "no survey has been conducted to determine . . . how many women would be interested in pursuing a public single-sex education" and that "[t]he interest of South Carolina women in attending a Mary Baldwin-type program [such as was approved in *VMI II*] is unknown." *Faulkner I*, 858 F. Supp. at 560 (Faulkner Appendix at 46a). The District Court found that defendants had not offered any evidence as to the number of women interested in attending a single-sex college; in contrast, between twenty and fifty women would join the Corps of Cadets each year if women were admitted to The Citadel. *Id.*[2] Moreover, the District Court noted that the

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[2] In their statement of facts, petitioners recite certain factual findings regarding an alleged lack of demand among women contained in a report issued by the South Carolina Legislative Study Committee on Single-Gender Educational Opportunities for Women. See Petition at 9. Petitioners fail to disclose that the District Court excluded the Committee's

(Footnote continues on following page)

United States Supreme Court "continues to clearly proclaim that those rights created by the Equal Protection Clause of the Fourteenth Amendment are personal, individual rights" that cannot be denied based upon the number of other persons who seek access to a state benefit. *Id.* at 565 (Faulkner Appendix at 57a).

Turning to remedy, the District Court found that the only available means to redress the violation of Shannon Faulkner's rights was to order her immediate admission into the Corps of Cadets program. *Id.* at 568 (Faulkner Appendix at 62a-63a). The District Court's remedial order was supported by a series of specific findings. The District Court found that defendants refused to propose or develop any remedial plan, and that the so-called "remedial plan" offered by defendants "does not select any one remedy or even prioritize those suggested." *Id.* at 561 (Faulkner Appendix at 47a). Even after the District Court denied their motion to bifurcate the liability and remedial phases of the trial, petitioners refused to propose any remedy prior to trial, and instead unilaterally advised the District Court that they would file a specific plan 60 days after a determination of liability. The court found that "no effort has been made to determine the feasibility of any specific remedy" or even to contact the state legislature about the plan. *Id.* at 561 (Faulkner Appendix at 47a). The District Court further found that "[n]ot once has a defendant done anything to indicate that it is sincerely concerned to any extent whatsoever about Faulkner's constitutional rights." *Id.* at 567 (Faulkner Appendix at 61a-62a).

(Footnote continued from preceding page)

report from admission into evidence at trial. Tr. Vol. XIX, 67:13-17; 61:4-63:16; *see also* JA 441-442. The District Court held that the report was inadmissible under Rule 804(8)(c) of the Federal Rules of Evidence. The court found that the report did not qualify as the report of a public office or agency, and that the committee had not been granted authority by law to investigate the matters discussed in the report. In addition, the district court ruled that the report lacked trustworthiness, based primarily on the circumstances of the committee's formation and composition, both of which were dominated by Citadel alumni.

In addition, the District Court found that The Citadel could not afford to go private, and that it would take up to ten years before a new institution could be completed. *Id.* at 561 (Faulkner Appendix at 47a-48a). Under all of these circumstances, the District Court held that Shannon Faulkner was entitled to immediate admission into the Corps of Cadets and entered a final judgment on August 5, 1994, specifying the details of her admission. *See* Order of District Court dated August 5, 1994 (Faulkner Appendix C). In its order, the District Court did not require any changes in The Citadel's structure, methodology or physical standards. The Fourth Circuit granted defendants' application for a stay in a 2-1 decision, without written opinion. August 12, 1994 Order of the Fourth Circuit (Faulkner Appendix G). Judge Hall filed a dissenting opinion. *Id.*

C. *The Court of Appeals' Decision in Faulkner II*

South Carolina did not appeal any of the factual findings of the District Court. Instead, it raised two narrow issues on appeal: (1) whether the District Court erred by analyzing the Citadel's males-only policy as a facially discriminatory gender classification; and (2) whether the District Court erred in ordering the immediate admission of Shannon Faulkner into the Corps of Cadets. Petitioners did not raise either of the grounds for certiorari asserted in their petition for a writ of certiorari.

On April 13, 1995, the court of appeals affirmed the District Court's decision that The Citadel's males-only admission policy violates the right of Shannon Faulkner and other qualified young women to equal protection. It held that South Carolina provides men with a unique and valuable military-style education at The Citadel, while denying women any comparable opportunity. *Faulkner II*, 51 F.3d at 451 *(Hall, J. concurring)* (Faulkner Appendix at 19a-20a). The court of appeals did not rule upon the legal issue of whether an absence of demand among members of one gender may justify offering single-gender education to that gender. Instead, the

court of appeals held that "we concur in the District Court's finding that the defendants failed to present evidence supporting an absence of demand." *Faulkner II*, 51 F.3d at 444-45 (Faulkner Appendix at 8a). The court of appeals explained that "[a]s the attorney representing South Carolina was required to concede at oral argument, there really is no data before this court to support a finding of an absence of demand among women of the present time *for single-gender education of any type.*" *Id.* (emphasis added) (Faulkner Appendix at 8a-9a).

The court of appeals also affirmed the District Court's ruling requiring the admission of Shannon Faulkner into the Corps of Cadets in August, 1995, unless defendants could propose and implement an alternative remedy that met with the approval of the District Court before that time. It held that South Carolina had failed to propose any remedy for Shannon Faulkner or other women, despite being on notice since 1992 that such action was required. *Id.* (Faulkner Appendix at 14a). The court of appeals concluded that:

> [A] . . . state may not contrive to ignore a clear judicial mandate finding a constitutional violation and still retain the opportunity to select its course of remedy. This principle applies with even greater force in a case such as this, which was filed over two years ago by an individual plaintiff who is presently in the midst of her college career and for whom *time is of the essence*. (Emphasis added.)

Id. at 450 (Faulkner Appendix at 17a). However, the Fourth Circuit held that "in view of the lapse of time caused by the prosecution of this appeal and the complexity of these issues," it was "impracticable" for South Carolina to develop, implement, and obtain judicial approval for a remedial plan for other women by August 12, 1995, as originally ordered by the District Court. *Id.* at 448 (Faulkner Appendix at 15a). It directed the District Court to set a new schedule for the review and implementation of a remedial proposal.

In a concurring opinion, Judge Hall concluded that the only remedy possible was the integration of women into VMI and The Citadel. He rejected the assumption that *Faulkner* and *VMI* are about single-gender education, concluding instead that they "have very much to do with wealth, power, and the ability of those who have it now to determine who will have it later." *Id.* at 451 (Faulkner Appendix at 20a). Judge Hall observed that the Fourth Circuit decisions in this case "promoted a means to an end—single gender education—to the status of an end in itself and avoided ascertaining, let alone analyzing, the true purpose behind the state's decision to keep women out of VMI." *Id.* (Faulkner Appendix at 19a).

South Carolina did not seek reconsideration of the order of this Court, nor move for a stay of the mandate, which issued on June 5, 1995.

D. *South Carolina's Remedial Proposal and District Court Scheduling Order Issued on July 24, 1995*

Failing to heed the warning of the Fourth Circuit that time was running out, South Carolina delayed for nearly two months before submitting a five-page remedial plan to the District Court on June 5, 1995, which defendants amended on June 16. July 24, 1995 Order of the District Court (Appendix A to Faulkner's Brief In Opposition). Defendants propose to create a non-military leadership program for women at Converse College, a private women's college in Spartanburg, South Carolina. *Id.* at 5.

On July 24, 1995, the District Court issued a written order scheduling a hearing on the remedial proposal to commence on November 6, 1995. The District Court found that South Carolina and The Citadel refused to cooperate in expediting discovery and, by their conduct, made it impossible to schedule a hearing on their remedial proposal before August 12. Rather than expedite discovery, as they had promised, defendants "continued to make the plaintiffs dig for every piece of information they get." *Id. at 10a.* The District

Court explicitly found that defendants had failed to respond to legitimate requests for discovery, requiring plaintiffs to move on three occasions to compel production of documents and interrogatory responses. It held that:

> Instead of speeding the discovery process up, they have slowed it down. Instead of being open and fair as they promised, it has been business as usual for the defendants. They have failed to respond properly to discovery requests in violation of the rules of this court, and they have made legitimate objections to discovery that seem to serve little or no useful purpose for them but delay the completion of discovery significantly.

July 24, 1995 Order (Appendix A to Faulkner's Brief In Opposition). The District Court concluded that "the case is not even near being in a position to try at this time. The parties need at least several more months to prepare." *Id.*

E. *Supreme Court Review in VMI II and Faulkner II*

On May 26, 1995, the United States filed a petition for certiorari seeking review of the Court of Appeals' remedial decision in *VMI II*. The petition presents the issue of whether the facts and circumstances in *VMI II* justify a separate program for women at Mary Baldwin College. On July 10, 1995, Shannon Faulkner filed a petition for certiorari seeking review of the remedial aspect of the decision permitting South Carolina to remedy the unconstitutional exclusion of women from The Citadel by creating a separate and intentionally unequal program for women. After the District Court on June 28, 1995 scheduled a hearing on July 11 to consider whether to extend discovery beyond August 12, The Citadel sought and obtained an extension of time for presenting a petition for a writ of certiorari in this case.

F. *Application to Stay The Mandate*

On August 2, 1995, petitioners filed a motion to recall and stay the mandate of the Court of Appeals decision of April 13, 1995, which issued on June 5, 1995. The Fourth Circuit denied that motion on August 8, 1995. Petitioners filed a second emergency motion to stay the admission of Ms. Faulkner with the Court of Appeals on August 3, which the Court of Appeals denied on August 9, 1995.

Applicant filed an Emergency Application for a stay with Chief Justice Rehnquist on August 7, 1995. The Chief Justice denied the application on August 11, 1995 (Appendix B to Faulkner's Brief in Opposition). Petitioners refiled their application for a stay with Justice Anton Scalia, who denied the application on that same day.

PETITIONERS ARE NOT ENTITLED TO A WRIT OF CERTIORARI

Petitioners assert that the decision below presents two questions worthy of certiorari: (1) whether the courts below exceeded their jurisdiction in this case by adjudicating the constitutionality of South Carolina's failure to provide an all-female program like The Citadel; and (2) if not, whether a lack of demand for an all-female military-style program justifies the State's failure to provide such a program. Neither of the questions is remotely presented by the decision below. Petitioners fundamentally misrepresent the holdings and analysis of the Fourth Circuit, omitting any reference to the court's determination that the exclusion of women from The Citadel is unconstitutional, to connect grounds for review where none exist. Their misstatements of law fatally undermine the basis for their petition.

The court of appeals unambiguously affirmed the holding of the District Court "that South Carolina and The Citadel are in violation of the Equal Protection Clause" and "are denying Ms. Faulkner equal protection of the laws in violation of the Fourteenth Amendment." *Faulkner II*, 51 F.3d at 446, 442 (Faulkner Appendix at 9a). Both of petitioners'

purported grounds for seeking certiorari, however, are premised upon their repeated misrepresentation of the decision below as having held that the males-only admission policies of VMI and The Citadel were constitutional. Petitioners erroneously assert that "[t]he court of appeals . . . concluded that The Citadel's males-only admission policy satisfies the equal protection standard established by this Court in *Hogan*," Citadel Petition at 13, and that, in *VMI I*, the court "[concluded] that VMI's males-only admission policy is constitutionally justified . . ." Citadel Petition at 4. Quite clearly, if petitioners were correct, there would have been no remedial proceedings in either case, and petitioners would not have filed this petition.

Petitioners likewise misrepresent that "the courts below required applicants to justify the State's failure to establish an all-female military program like The Citadel Citadel Petition at 8, 16-17," and adjudicated the question of whether South Carolina was "constitutionally obligated to provide an all-female military program like The Citadel." (*Id.* at 21). The District Court ordered a trial to permit defendants to offer evidence to establish any issue that defendants claimed distinguished themselves from the finding of liability in *VMI, and Faulkner*, and ordered a trial on remedy. 858 F. Supp. at 555 (Faulkner Appendix at 36a). Petitioners' claim that the court of appeals "concluded" that South Carolina was "constitutionally obliged" to provide an all-female Citadel is equally false. The court of appeals held that South Carolina "failed to present evidence . . . [of] an absence of demand." *Faulkner II*, 51 F.3d at 444-445 (Faulkner Appendix at 6a). It did not require South Carolina to create a separate program for women, but offered the opportunity to avoid the admission of women by proposing a "parallel" program for women. *Faulkner II*, 51 F.3d at 448 (Faulkner Appendix at 14a).

In another egregious misrepresentation, petitioners assert that the court of appeals found in *Faulkner II* that single-sex education was "pedagogically beneficial," that The Citadel's so-called "adversative method" is "pedagogically

justified," and that coeducation would destroy The Citadel's ability to provide these educational benefits. Citadel Petition at 28-29. To support its assertions, petitioners cite to *VMI*, 976 F.2d 890 (4th Cir. 1992) *cert. denied*, 113 S. Ct. 2431 (1993) which did not consider or address The Citadel. Petitioners blatantly substitute "The Citadel" for "VMI", deliberately misstating the holding of *VMI*. The court of appeals made these factual findings in *VMI*, but not in *Faulkner*. The District Court in *Faulkner* limited the hearing last May 1994 to those issues that defendants contended distinguished South Carolina from Virginia; it did not try the issue of whether single-sex education has value or whether coeducation would destroy The Citadel. (Faulkner Appendix at 67a-68a). The District Court explicitly preserved the plaintiffs' ability to raise "all of the VMI holdings" that were accepted solely for the proposes of determining plaintiff's motion for summary judgment. *Faulkner I*, 858 F. Supp. at 555 (Faulkner Appendix at 36a).[3]

Petitioners distort the court of appeals' decision beyond recognition. In addition, petitioners fail to establish that either question merits judicial review by this Court, as discussed below.

A. *There is No Question of Justiciability*

Petitioners do not dispute that Ms. Faulkner had standing to challenge her exclusion from The Citadel, but instead argue that the courts below "exceeded their jurisdiction in this case by reaching the issue of whether the absence of an all-female military program like The Citadel is constitutionally justified." Citadel Petition at 13. Petitioners erroneously assert that the court of appeals "concluded that The

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[3] The evidence in *Faulkner* is completely to the contrary. The Citadel's own witnesses admit that coeducation will not affect its ability to fulfill its mission, teach leadership, or instill honor in its cadets. Joint Appendix in the Fourth Circuit ("JA") 739, 757. At trial, a witness for The Citadel testified that women "could do everything that a male cadet can do." JA 237-238.

Citadel's males-only admission policy satisfies the equal protection standard established by this Court in *Hogan*" and that it *sua sponte* considered and adjudicated the issue of "whether South Carolina is constitutionally obliged, in light of The Citadel's males-only admission policy, to establish an all-female military program like The Citadel." Petition at 13-14. Petitioners acknowledge that they never raised this argument in the lower courts, prior to filing their application for a stay on August 7, 1995 to prevent Ms. Faulkner from joining the Corps of Cadets. Application for Stay at 6, n.3.

Petitioners' argument fundamentally mischaracterizes the decision below. The court of appeals did not conclude that The Citadel's males-only admission policy was constitutional, but explicitly reaffirmed the District Court's decision that "that South Carolina and The Citadel are in violation of the Equal Protection Clause." *Faulkner II*, 51 F.3d at 446 (Faulkner Appendix at 9a). Having found that petitioners "are denying Faulkner equal protection of the laws," the court of appeals concluded that South Carolina may attempt to remedy the violation by creating a separate, and intentionally unequal, program for women. *Id.* at 442 (Faulkner Appendix at 4a). The court afforded petitioners the option to establish a parallel program for women rather than admit women to The Citadel. Petitioners can hardly complain that the Court of Appeals provided them a choice of remedy.

The court of appeals did not *sua sponte* adjudicate the constitutionality of the absence of an all-female Citadel, as petitioners assert, but instead considered the absence of an alternative for women in evaluating the justification for the exclusion of women proffered by petitioners themselves. Under *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982), gender classification is unconstitutional unless the state demonstrates that it is substantially related to an important governmental objective. Petitioners argued below that the exclusion of women from The Citadel is substantially related to a policy of "diversity in education, which includes

single-sex institutions where there is sufficient demand to support the same." *Faulkner I*, 858 F. Supp. at 560; Faulkner II, 51 F.3d at 445 (Faulkner Appendix at 44a-45a, 8a). Petitioners argued further that the absence of any military-style education for women in South Carolina was justified by a lack of demand among women for a single-sex education.[4] The courts below considered, and rejected, that proffered justification. *Faulkner II*, 51 F.3d at 446 (Faulkner Appendix at 9a).

Having squarely presented this very issue to justify their discriminatory admissions policy, petitioners cannot now complain that the court of appeals "sua sponte" raised the issue or exceeded its jurisdiction in considering whether it satisfies the requirements of the Equal Protection Clause. To the extent that petitioners claim that the courts below "exceeded" their jurisdiction, none of the cases cited by petitioners addresses that issue. *Allen v. Wright*, 468 U.S. 737, 753 n. 19 (1984). Instead, the cases consider whether particular plaintiffs lacked standing to commence an action in the first instance.

The Article III requirement of a "case or controversy" is amply satisfied in this case. Petitioners concede that Ms. Faulkner has standing to challenge her exclusion from The Citadel. Citadel Petition at 20. "In essence the question

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[4] Petitioners argue that the relevant lack of demand is for a women-only educational program that exactly mirrors The Citadel. Petition at 28. Petitioner's own counsel, however, conceded in oral argument before the court of appeals that there was no evidence of a lack of demand "for single-gender education of any type." *Faulkner II*, 51 F.3d at 446 (emphasis added). Petitioners did not raise this argument in the courts below and, in fact, took the opposite view at trial, where they argued that the absence of demand among women for a single-gender education caused Winthrop College, a liberal arts college for women, to admit men in the mid-1970's. See *Faulkner I*, 858 F. Supp. at 445. Further, petitioners now contend that South Carolina can remedy the violation by providing a non-military program for women at Converse College, which does not remotely resemble The Citadel.

of standing is whether the litigator is entitled to have the court decide the merits of the dispute or of particular issues." *Allen v. Wright*, 468 U.S. 737, 751 (1984). A plaintiff must have suffered a violation of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). The injury must be "fairly traceable" to the challenged action of the defendant, and likely to be redressed by the requested relief. *Allen*, 468 U.S. at 751.

In this case, Ms. Faulkner applied and was accepted to The Citadel. Petitioners "admit that, except for her sex, Faulkner is qualified to be a member of the Corps of Cadets." *Faulkner I*, 858 F. Supp. at 555 (Faulkner Appendix at 37a). The Citadel revoked its acceptance solely because she was female. Ms. Faulkner plainly suffered an "actual or imminent" injury that was "fairly traceable" to that unconstitutional admissions policy. *See Lujan*, 504 U.S. at 560.

The fact that Ms. Faulkner did not seek an all-female program does not deprive the plaintiffs of standing, or the courts below of jurisdiction. The "redressibility" component of the standing inquiry "examines the causal connection between the alleged injury and the judicial relief requested." *Allen*, 468 U.S. at 753 n. 19. Ms. Faulkner requested admission to The Citadel, which surely would remedy her unlawful exclusion. Moreover, this Court held in *Heckler v. Mathews*, 465 U.S. 728, 739-740 & n.8 (1984), that the possibility that a court may order remedial relief not sought by a plaintiff does not affect his or her standing to challenge a policy that violates the right to equal protection. In *Mathews*, the male plaintiff challenged the provision of spousal benefits under the Social Security Act to women, but not to men. While the plaintiff asked the Court to extend the benefits to men, this Court held that the government could remedy the violation by extending the benefits or withdrawing them entirely. The challenged legislation contained a severability clause which provided that the benefits automatically would be withdrawn if the statute was found unconstitutional. This Court held that

the male plaintiff nonetheless had standing to maintain the action, even though the only available relief was to terminate the disputed benefits. *Mathews*, 465 U.S. at 737.

B. *The Decision Below Rejecting Petitioners' Justification Based Upon an Alleged Lack of Demand Among Women for Single-Sex Education is Solely Fact-Based and Does Not Warrant Certiorari*

Petitioners do not offer a single reason why this Court should grant certiorari to review the factual determination of the courts below that petitioners failed to offer evidence of any alleged "lack of demand" among women for single-sex education in South Carolina. The holding below is purely fact-bound and does not merit certiorari. Even if the court of appeals ruled as a matter of law that a state cannot deny a person equal protection based upon the number of persons who seek access to a state program, petitioners have failed to identify any decisions of this Court, or any other court, which would conflict with that proposition. The question presented is entirely meritless and unworthy of review by this Court.

Petitioners concede that the court of appeals did not rule on the legal issue of whether an absence of demand among members of one gender may justify offering single-gender education to that gender. Instead, the court of appeals held that "we concur in the District Court's finding that the defendants failed to present evidence supporting an absence of demand." *Faulkner II*, 51 F.3d at 444-45 (Faulkner Appendix at 8a). Both lower courts rejected their claim that "single-sex educational opportunities are not available to women in South Carolina's public system of education because there is insufficient demand for them." *Faulkner II*, 51 F.3d at 444 (Faulkner Appendix at 6a) (quoting the District Court). The District Court found that "no survey has been conducted to determine . . . how many women would be in-

terested in pursuing a public single-sex education" and that "[t]he interest of South Carolina women in attending a Mary Baldwin-type program [such as was approved in VMI II] is unknown." *Faulkner I*, 858 F. Supp. at 560 (quoted in *Faulkner II*, 51 F.3d at 445 n.2) (Faulkner Appendix at 6a). While petitioners argued that Winthrop College, a former public college for women, decided to admit men due to a lack of demand for single-sex education, both lower courts found that the evidence did not support that assertion. *Faulkner I*, 858 F. Supp. at 566; *Faulkner II*, 51 F.3d at 445-446 (Faulkner Appendix at 8a-9a).

The court of appeals concluded that, in light of these findings, petitioners simply "failed to present evidence [supporting] an absence of demand." *Faulkner II*, 51 F.3d at 445 (Faulkner Appendix at 6a). The court of appeals held that:

> Thus, even though it is South Carolina's currently announced policy to provide single-gender education to both men and women and to allow gender-neutral factors, including demand and institutional autonomy, to determine whether public single-gender education will in fact be provided to each gender, this policy cannot justify the state's failure to offer single-gender education to women *when an absence of demand among women for such education has not been demonstrated.*

Id. at 446 (Faulkner Appendix at 9a).

As the Fourth Circuit concluded, there is no need to address the legal merits of petitioners' proferred justification in the absence of any convincing evidence to support an alleged "lack of demand" among women. *See Faulkner* II, 51 F.3d at 446 (Faulkner Appendix at 8a). The factual findings of the courts below are entitled to great deference and this Court is unlikely to reverse them on appeal. *See Graver Tank & Mfg. Co. Inc. v. Linde Air Prods. Co.* 336 U.S. 271 (1949).

Certiorari is not an appropriate vehicle to review factual determinations of lower courts.

Even assuming *arguendo* that the court of appeals had held that an absence of demand among women for a single-sex education does not justify denying women admission to The Citadel, petitioners have not identified a single decision of this Court, or any other court, that conflicts with that proposition. The absence of any doctrinal support for petitioners' novel defense is hardly surprising. Under the Fourteenth Amendment, a state may not "deny to any person within its jurisdiction the equal protection of the laws." This court repeatedly has held that the right to equal protection does not depend on the number of other members of a class that seek access to a program from which they have been excluded. *See, e.g., Adarand Constructors, Inc. v. Pena*, 115 S.Ct. 2097, 2100 (1995); *J.E.B. v. Alabama ex rel. T.B.*, 114 S.Ct. 1419, 1433 (1994). A state may not deny a woman, or any individual, equal access to a state education by asserting that there is a limited or insufficient demand by others for an educational program. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 351 (1938) (limited demand by blacks for legal education did not justify failure to provide law courses open to blacks); *Mitchell v. United States*, 313 U.S. 80, 97 (1941) (low demand by blacks for first class railroad transportation did not justify failure to provide equal facilities); *McCabe v. Atchison T. & S.F. Ry.*, 235 U.S. 151, 161 (1914) (same); *Carter v. School Bd.*, 182 F.2d 531, 535 (4th Cir. 1950) (small student population at black high school did not justify inferior curriculum); *see also Connecticut v. Teal*, 457 U.S. 440, 454-56 (1982) (law protects right of individuals to equal opportunity, not minority group as a whole) ("It is the individual who is entitled to the equal protection of the laws").

As this Court unambiguously explained in *McCabe*, the argument that lack of demand justifies a state's failure to provide an individual with the benefits afforded others "makes the constitutional right [to equal protection] depend upon the number of persons who may be discriminated against, whereas

the essence of the constitutional right is that it is a personal one . . . . It is the individual who is entitled to the equal protection of the laws." *McCabe*, 235 U.S. at 161; *see also Gaines*, 305 U.S. at 351. Indeed, this Court in *Hogan* declared Mississippi University females-only admission policy to violate the Fourteenth Amendment right to equal protection of a single male, and did not require him to show that other men sought or were interested in admission to Mississippi University for Women's nursing school.

Further, petitioners' lack of demand argument impermissibly makes an individual's access to her constitutional rights dependent on considerations of cost. The "vindication of . . . constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. City of Memphis*, 373 U.S. 526, 537 (1963); *Califano v. Goldfarb*, 430 U.S. 199, 217 *(1977)* (gender discrimination cannot be justified by cost or administrative convenience); *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973) (same); *Reed v. Reed*, 404 U.S. 71, 76 (1971) (same).

Faced with an impenetrable wall of authority from this Court, petitioners conjure two arguments. They attempt to distinguish *Gaines* and *McCabe* on the grounds that those cases dealt with discrimination based upon race, not sex. Citadel Petition at 27. Petitioners also argue that "[s]eparation of the races does not confer any benefit," while "[s]eparation of the sexes in single-gender education has been proven to be pedagogically beneficial." *Id.* Neither argument has any merit. All of these cases were decided prior to *Brown v. Board of Educ.*, 347 U.S. 483 (1954), before racial classifications were inherently suspect. They do not turn on the level of scrutiny afforded a particular classification, but rather upon the nature of the right to equal protection. Contrary to petitioners' suggestion, these pre-*Brown* cases are particularly appropriate, as they were decided at a time when the law reflected a belief that separation of the races *was* beneficial and constitutional.

C. *Applicant's Petition Does Not Raise Any Issues of Exceptional or National Significance*

The Supreme Court is unlikely to grant certiorari to review the determination of liability by the Court of Appeals, having denied a similar petition for certiorari filed by VMI in 1993 to review the Fourth Circuit's determination that VMI's males-only admission policy violated the Fourteenth Amendment. *United States v. Commonwealth of Virginia*, 113 S. Ct. 2431 (1993).[5]

The court of appeals' decision represents a straightforward application of the *Hogan* test to the facts of this case. Those facts primarily involve The Citadel, an institution that petitioners have consistently described as "unique." *See* Citadel Petition at 4. The court of appeals' opinion was narrowly written, resting primarily on the absence of evidence of a 'lack of demand' among women for single-sex education. Thus, the liability determination in the decision below simply does not break any new ground.[6]

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[5] The fact that Shannon Faulkner in this case, and the United States in *VMI*, have filed petitions for certiorari hardly establishes that petitioners' petition will be granted. The United States and Shannon Faulkner challenge the remedial aspect of the Fourth Circuit's decision permitting a separate and unequal non-military program for women -- an issue which South Carolina is unlikely to raise in its petition. In fact, the defendants in *VMI* (represented by some of the same attorneys as South Carolina) have opposed the United States' petition for certiorari in *VMI*, arguing that the remedial issues in *VMI* do not raise important constitutional questions.

[6] In contrast, the portion of the decision in *Faulkner II* addressing remedy does raise important issues that justify certiorari. Unlike its discussion of liability, the remedial portion of *Faulkner II* diverges from the well-established equal protection analysis in *Hogan* and *J.E.B. v. State of Alabama*, 114 S. Ct. 1419 (1994) by creating a "special equal protection analysis" to review a state's remedial choice to create a "separate and unequal" program for women.

CONCLUSION

Applicant's petition for writ of certiorari is without any basis and should be denied.

Dated: New York, New York

Respectfully submitted,

September 11, 1995

Henry Weisburg
Thomas F. Swift
Mary K. Warren
Vanessa Beever
SHEARMAN & STERLING
Citicorp Center
153 East 53rd Street
New York, NY 10022
(212) 848-4000

Suzanne E. Coe
ARNOLD & COE
408 North Church Street,
Suite C
Greenville, SC 29601
(803) 235-4505

Valorie K. Vojdik
Counsel of Record
New York University
School of Law
137 MacDougal Street
New York, NY 10012
(212) 998-6550

Robert R. Black
23 Broad Street
P.O. Box 643
Charleston, SC 29402
(803) 577-5806

APPENDIX

APPENDIX A

United States District Court
District of South Carolina

Shannon Richey FAULKNER, Individually
and on behalf of all others similarly situated, Plaintiff,
and
the United States of America, Plaintiff-Intervenor,
v.
James E. JONES, Jr., Chairman, Board of Visitors of
The Citadel, et al., Defendants,

Civ. A. No. 2:93-488-2.

United States District Court,
D. South Carolina,

July 24, 1995.

ORDER

HOUCK, Chief Judge.

The plaintiff Shannon Richey Faulkner (Faulkner) instituted this action on March 2, 1993, claiming that the defendant Citadel's failure to admit her to its Corps of Cadets because of her sex violated her Equal Protection Rights guaranteed by the Fourteenth Amendment to the United States Constitution. On June 7, 1993, the United States of America was permitted to intervene as a plaintiff to assert the rights of all qualified women to be admitted to the Citadel. The trial of this case began nonjury on May 16, 1994, in Charleston, South Carolina, and concluded on May 27, 1994. On July 22, 1994, the court filed its Findings of Fact, Conclusions of Law, and Order in the matter.

The court found that the all-male admissions policy of the Citadel violated the Equal Protection Rights of the plaintiff Faulkner and all other women otherwise qualified to be mem-

bers of the Corps of Cadets. As to the plaintiff Faulkner, it concluded that the only remedy available to satisfy her constitutional rights was immediate admission to the Corps of Cadets. As to other qualified women, the defendants were required to fulfill their constitutional rights by admitting them to the Corps of Cadets or providing an alternative remedy in time for the 1995-1996 school year. The defendants filed an appeal from the court's order of July 22, 1994, and the Fourth Circuit Court of Appeals stayed the same pending a decision on said appeal.

On April 13, 1995, the Fourth Circuit Court of Appeals affirmed the court's July 22, 1994 order. In so doing it made the following statement:

> ... we affirm the district court's conclusion that South Carolina and The Citadel are in violation of the Equal Protection Clause in offering, without sufficient justification, single-gender education only to males. We also affirm the substance of the district court's remedial order, but with the modification that it establish a timely but practicable schedule for South Carolina to formulate, adopt and implement a plan that conforms with the Equal Protection Clause, and if the plan is not court approved and implemented by the date in August 1995 when the Cadets are required to report, The Citadel must admit Shannon Faulkner to the Corps of Cadets as ordered by the district court.

Faulkner v. Jones et al., 51 F.3d 440, 450 (1995). On June 5, 1995, the defendants filed South Carolina's Proposed Remedial Plan in which they proposed the South Carolina Institute of Leadership for Women (SCIL) at Converse College as a parallel program satisfying the Equal Protection Rights of women desiring to be admitted to the Citadel. In said initial filing details of the proposed program were lacking. Amendments to the plan filed by the defendants on June 12, 1995, and June 16, 1995, provided additional details.

The court estimates that it will take a minimum of two weeks to try this matter and issue a ruling. If the court is to approve and implement the remedial plan before the cadets are required to report on August 12, 1995, therefore, a period of only six weeks will have been available to conduct discovery. Experience dictates that six weeks is not a sufficient period of time for discovery in a case such as this. Only the simplest of cases require such a short discovery period. The court would normally permit a minimum of from four months to six months of discovery in this case. From the very moment the remedial plan was filed, therefore, it had grave reservations about attempting to consider the plan before August 12, 1995.[1]

In spite of the foregoing, the court thought it was only fair to look into the matter and see what could be done, and it conducted a hearing in Charleston, South Carolina, on June 7, 1995, for that purpose. At that time the plaintiffs argued very strongly that it was impossible for them to be prepared to meet the August 12, 1995 deadline. The defendants, on the other hand, advised the court that they were going to provide the plaintiffs all discovery material they needed without delay and insisted there was sufficient time to dispose of the matter within the stated time frame. The court made it clear to the defendants that since their failure to file the proposed

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[1] This court has followed very closely the litigation involving Virginia Military Institute (VMI) and a remedial plan similar to the one proposed here by the defendants which was developed at Mary Baldwin College (MBC) in order to preserve VMI's all-male admissions policy. That plan was filed with the United States District Court in September 1993 and approved by that court on April 29, 1994, for implementation during the 1995-1996 school year.

remedial plan in a timely fashion[2] created the time problem now presented, they would be called upon to make an extraordinary effort to relieve the plaintiffs of the prejudice caused to them by the shortness of time. As stated, the defendants assured the court that they would do just that. Under such circumstances, the court decided that it would give the matter its undivided attention and keep an open mind as to what could be accomplished within the limited time available.

The various instruments of discovery "serve... to narrow and clarify the basic issues between the parties, and ... as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues." *Hickman v. Taylor*, 329 U.S. 495, 501 (1947). They make a trial in federal court "less a game of blindman's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *U.S. v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). The general purpose of discovery in this court has been described as follows:

> The basic philosophy underlying this procedure was that prior to trial every party to a civil action is entitled to the disclosure of all relevant information in the possession of any person, unless the information is privileged. The discovery procedures adopted in 1938 and expanded in ensuing decades enabled a party not only to narrow the issues and obtain evidence for use at the trial, but also to discover infor-

---

[2] The defendants have been on notice for a substantial period of time that they would ultimately be required to obtain court approval of a remedial plan such as the one they have now filed. Indeed, the Fourth Circuit Court of Appeals found that they were placed on such notice as early as October 1992. *Faulkner v. Jones*, 51 F.3rd 440, 447 (4th Cir. 1995). The message became louder and clearer on November 17, 1993, when the Fourth Circuit Court of Appeals first considered this case. *Faulkner v. Jones*, 10 F.3rd 226 (4th Cir. 1993). Then, in February 1994, this court required the defendants to present such a plan to it for approval. They failed to do so until June 5, 1995.

> mation about where and how such evidence could be obtained.

8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2001 (1994). Since its introduction, discovery has become ingrained in our system of federal jurisprudence. The right of a litigant to pursue discovery is an essential ingredient of a fair trial. Before a trial can be had in this case, or for that matter any case pending in this court, it must be clear that the parties have had a fair and reasonable opportunity to conduct discovery. Where that is controverted, as it is here, it is seldom easy to make such a determination. The attorneys almost always accuse each other of wrongdoing in the discovery process. The only way for the court to reach a sensible conclusion is for it to look at the substance of the discovery, the requests made therefor and the responses given to those requests, and that is precisely what the court must do in this case to determine whether or not there has been enough discovery to permit trial to proceed at this time.

The plaintiffs served their initial discovery requests on June 9, 1995. They consisted of 84 requests for the production of documents pursuant to Rule 34 of the Federal Rules of Civil Procedure and 41 interrogatories propounded pursuant to Rule 33 of the Federal Rules of Civil Procedure. Thereafter, the court had telephone conference calls with the parties on June 15, 1995, and June 20, 1995, and conducted hearings in Charleston, South Carolina, on June 22, 1995, July 11, 1995, and July 19, 1995, for the purpose of determining and resolving problems with discovery. Verbatim records were made of all the telephone conferences and the hearings. They reveal better than anything else how discovery has been conducted in this case, but the court believes that it will be informative to briefly review the same at this time.

At the June 15, 1995 conference, counsel for the defendants again assured the court that they were making every effort to comply with the requests for discovery made by plaintiffs. Attorney General Condon stated that "on the discovery side, we think that we will be in total compliance with these

matters, maybe by tomorrow. [W]e are well along with the discovery requests, and do not anticipate making any objections; if we do, there will be very few." Transcript Conf. Call June 15, 1995, p 14.

The telephone call of June 20, 1995 was scheduled to determine the status of discovery and schedule a hearing in Charleston, South Carolina to deal with any problems that existed. At that time the attorneys for the defendants advised that they had continued to meet the discovery requests of plaintiffs and had either fulfilled all of them or would do so very quickly. Counsel for the plaintiffs, however, disagreed with those assertions. They opined that the document productions made by the defendants were incomplete, and that the defendants had made no response to the interrogatories propounded on June 9, 1995.

At the June 22, 1995 hearing the court considered the specific objections the plaintiffs made to the document responses of the defendants.[3] They objected to 28 such responses, and the court went through each one with counsel for both sides. It was obvious that some errors in responses were inadvertent and probably resulted from an effort to do too much too fast. In other instances, however, the defendants simply failed to produce documents that were available and should have been produced. In the final analysis, the court ordered the defendants to supplement virtually all of the 28 responses objected to by the plaintiffs.

Another hearing was scheduled in Charleston on July 11, 1995. The defendants had, on or about June 30, 1995, filed answers to the interrogatories propounded by plaintiffs on June 9, 1995, and the sufficiency of those answers was considered then. The defendants interposed three broad objec-

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[3] It should be noted that we are dealing with literally thousands of pages of documents. It takes an enormous amount of time to compile them for production and probably even more time to review them upon receipt to determine if the production is adequate. Likewise, it takes the court a great deal of time to go through the requests and the productions carefully to determine if the latter are adequate.

tions to the plaintiffs interrogatories but, subject to the same, responded thereto. The court overruled said objections and examined each interrogatory and answer carefully. It then required the defendants to supplement their answers to approximately 8 of the interrogatories propounded by plaintiffs. There is considerable overlapping and duplication in the interrogatories, and the court consolidated some in making its ruling. It is, therefore, difficult to say exactly how many interrogatories were involved, but a good estimate would be that approximately one-third of the interrogatories needed to be supplemented.

At a hearing held in Charleston on July 19, 1995, the plaintiffs claimed that the defendants had not furnished the documents the court required to be produced on June 22, 1995. They also listed other documents that had been identified during discovery and needed to be produced.

The court previously concluded that a large number of the responses defendants made to the discovery requested by plaintiffs were inadequate, and it ordered the defendants to supplement the same. Those numbers alone, 28 requests for document production and approximately one-third of the interrogatories propounded, clearly show how the defendants have treated discovery since June 7, 1995, but a detailed explanation of a typical response will be further illustrative. Interrogatory Number One propounded by the plaintiffs for answer by the defendants asked the defendants to name all persons who took part in formulating the SCIL plan. In response, the defendants named a number of individuals. They also listed, "Counsel for the State of South Carolina", which is an improper answer because it fails to name a "person" as required by the question. Interrogatory Number Two required the defendants to state what each of the persons identified in answer to Interrogatory Number One did in helping to develop the SCIL program. As a part of its answer to that interrogatory, the defendants stated, the "contract with the State of South Carolina was negotiated by counsel for Converse, Dr. Thomas and George Dean Johnson, Chairman of the Converse Board of Trustees, with counsel for the State of South Caro-

lina." The attorneys for the plaintiffs said in open court that prior to the filing of the remedial plan on June 5, 1995 their only knowledge about the negotiations leading thereto was from news coverage of the same. They also said that they assumed from said coverage that Attorney General Condon represented the State of South Carolina in negotiating the SCIL contract with Converse College. Only when they deposed Attorney General Condon on July 17, 1995, did they learn to the contrary. The first question at that deposition attempted to learn the names of all persons involved in the negotiating and drafting of the contract between the State of South Carolina and Converse College. Thereafter, the following took place:

> Q. And what was your involvement in that process?
>
> A. My involvement? I felt my involvement was just starting it, getting it going, and more of a facilitator. I think one of the key people you want to talk to is Sam Applegate.
>
> Q. Now, who exactly--I understand he's an attorney one floor up above. Who was he representing during the process of negotiation of the contract?
>
> A. I hired him to, in effect, represent the State of South Carolina.
>
> Q. Do you have a contract for the provision of his services?
>
> A. Yeah. We worked it out. I say a contract. I don't know what the paperwork shows, but we worked it out with the Insurance Reserve Fund that he would submit his bills to this firm, I believe. I think that's the way it worked, and I don't know whether they require a form or a contract to be executed. I don't know, but I think what you'll find is that for

> all the particulars and the actual negotiation he would be the person who-- And as I recall, of course--this is a bit of a blur--it was just simply reported to me what was going on at times if I were in town. So he was basically the--I would call him the lead negotiator, in effect.

Deposition of Attorney General Condon, July 17, 1995 at p. 8. The contract negotiations between Converse College and the State of South Carolina are an important part of this case, and the defendants had to know that the plaintiffs wished to learn all details about the same through discovery. They also must have known that the plaintiffs were unaware of the role Sam Applegate played therein. Indeed, Attorney General Condon said at page 37 of the aforementioned deposition that one of the reasons he engaged San Applegate to conduct the negotiations was to keep the plaintiffs from knowing what was going on. In spite of all of these factors, however, the defendants deliberately withheld from the plaintiffs the important role Sam Applegate played in the contract negotiations when they were asked by the plaintiffs to furnish that information to them. Of course, the plaintiffs ultimately learned about Sam Applegate and will be able to depose him and learn everything he knows about the matter. In the process, however, valuable time has been wasted because the defendants failed to properly respond to the plaintiffs' interrogatories. When this scenario is repeated time after time, the discovery process is slowed to a standstill.

When South Carolina's Proposed Remedial Plan was filed on June 5, 1995, and the court began searching on June 7, 1995, for a way to consider approval and implementation of the same before August 12, 1995, it knew that such a goal would be difficult, if not impossible, to obtain. With the assurances made by the defendants that they would waive some objections and make a good faith effort to accelerate the discovery process, it seemed possible. In hindsight, it probably was possible. The problem is, the defendants have not done what they said they would. Instead of speeding the discovery

process up, they have slowed it down. Instead of being open and fair as they promised, it has been business as usual for the defendants. They have failed to respond properly to discovery requests in violation of the rules of this court, and they have made legitimate objections to discovery that seem to serve little or no useful purpose for them but delay the completion of discovery significantly.[4] In short, they have continued to make the plaintiffs dig for every piece of information they get. As a result, the case is not even near being in a position to try at this time. The parties need at least several more months to prepare. The court, therefore, reluctantly concludes that it cannot consider the issues relating to the approval and implementation of South Carolina's Proposed Remedial Plan prior to August 12, 1995.

The parties shall have until October 15, 1995 to complete discovery with the trial of all outstanding issues to commence on November 6, 1995.

AND IT IS SO ORDERED.

C. WESTON HOUCK
UNITED STATES DISTRICT
JUDGE

July 24, 1995
Charleston, South Carolina

[4] Two examples of such conduct that come to mind are their refusal to permit questions to be asked by the attorneys and experts of the plaintiffs upon visits to the Converse campus and the privilege-work product objections made during the depositions of Sandra C. Thomas and Anne Marie Whittemore.

APPENDIX B

August 11, 1995

Ms. Valorie Vojdik
Shearman & Sterling
153 East 53rd St.
New York, NY 10022-4676

Re: James E. Jones, Jr., et al.
v. Shannon Richey Faulkner, et al.,
Application No. A-127

Dear Ms. Vojdik:

The application for a stay of enforcement of a mandatory injunction pending filing and disposition of a petition for a writ of certiorari in the above-entitled case has been presented to the Chief Justice, who on August 11, 1995 denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

WILLIAM K. SUTER, Clerk
By

Christopher W. Vasil
Deputy Clerk